IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8547 OF 2004

M/s Suresh Fabrics .... Petitioner

Versus

Shri Mohankumar Jaigopal Arora .... Respondent

Ms.J.M.Sidhwa with Mr.I.P.D'Cruz for Petitioner

Mr.Sandesh Deshpande for Respondent

CORAM : A.S.Oka, J

DATE: 10th December, 2004

P.C.:

1. Rule. Learned counsel for the respondent waives service. Considering the facts and circumstances of the case, writ petition is forthwith taken up for hearing.

2. The challenge in this petition under Article 227 of the Constitution of India is to the order passed by the learned Additional District Judge, Thane on 4th August, 2004 by which application made by the Petitioners under section 5 of the Limitation Act, 1963 has been rejected. Prayer in the said application was for condonation of delay in preferring an appeal against the decree passed against the Petitioners in Special suit no.25 of 1978. The Respondent is the original plaintiff and the petitioners are defendants in the said suit.

3. Learned counsel appearing for the petitioners pointed out that the learned Additional District Judge has partly accepted the explanation for delay given by the petitioners in the application for condonation of delay. Learned counsel pointed out that in the impugned order the learned Additional District Judge has observed that the explanation for delay from the date of decree till the date of knowledge of the decree was acceptable. What is not accepted by the learned Judge is the explanation for the delay from the date on which the petitioners had knowledge about the decree till the date of filing the Appeal. Learned counsel submitted that as held by the Apex court in various judgments a liberal view ought to have been taken by the learned Additional District Judge as the petitioners were not

negligent.

4. Learned counsel appearing for the Respondents pointed out that the explanation given by the petitioner for remaining absent is false. He stated that it may be true that the Advocate engaged by the petitioners in the suit had shifted to Nagpur. He however pointed out that on their own showing the petitioners had engaged the services of another Advocate and in fact the roznama shows the presence of the Advocate for petitioners and even the application for certified copies of the Judgment and Decree was made under the signature of the said Advocate. He submitted that as the petitioners have approached the court with an explanation which is false, the delay does not deserve to be condoned and therefore, no interference was called for.

5. I have considered the rival submissions. The decree was passed by the trial court on 22nd March, 2002. Case of the petitioners is that they were not aware of the decree and they became aware of the decree for the first time on 3rd January, 2003 when the notice of Special Darkhast No.114 of 2002 filed by the Respondent for execution of the decree was served upon them. Thereafter, an application for obtaining the certified copy of the decree was filed on 24th January, 2003 and certified copies were received on 21st February, 2003. The Appeal was filed on 13th March, 2003 along with the application for condonation of delay. The learned Judge has found fault with the petitioners as the application for obtaining certified copy was given after 20 days from the date of knowledge of the decree and though certified copies were received on 21st February, 2003 the appeal was filed on 13th March, 2003. As stated earlier, the Appellate court has accepted the explanation for the delay up to 3rd January, 2003. In normal course, it will not be necessary for me to go into the delay till 3rd January, 2003. However, as the learned counsel appearing for the respondents has made a detailed submission on various alleged incorrect statements made by the petitioner in their application, therefore I am required to consider the said part of the delay also.

6. A copy of the roznama has been annexed to the petition. I have perused the roznama. The suit appears to have a very chequered history. Hearing of the suit was stayed in 1988

by this court and it appears that again the matter was taken to this court in the year 1990 and the suit was stayed. The entries in the roznama show that on 23rd March, 1995 the learned trial Judge directed that the notice should be issued to both the parties through the court. Roznama of 23rd November, 2000 shows that both the parties were absent and only the Advocate for the respondent/plaintiff was present. It appears that on the basis of the application at Exhibit 177 filed by the respondents, the learned Judge directed that the notice should be issued to the petitioners/defendants. The roznama dated 5th January, 2001 makes a very curious reading. It records firstly that the plaintiff is absent and the defendant's advocate is present. However in the next sentence, it is recorded that the defendant and his advocate were absent when called out. It appears that the notice was not issued to the petitioners as the plaint itself is in torn condition. The roznama dated 6th March, 2001 also shows that the plaint is in a torn condition and on the application made by the respondent/plaintiff time was granted for reconstruction of the plaint on 16th April, 2001, 3rd May, 2001,4th July, 2001, 25th July, 2001, 17th August, 2001 and 5th September, 2001. On the said dates, the suit appears to have been adjourned for taking steps of reconstruction of the plaint. On 3rd October, 2001 the roznama records that copy of the reconstructed plaint is supplied by the respondent/plaintiff and the defendants should take note of reconstruction of the plaint. The roznama of the next date i.e. 15th October, 2001 notes that the steps were not taken by the plaintiff Advocate and therefore the suit was adjourned for the defendants to take a note. Thus, it is apparent that though on 23rd November, 2000 the trial court directed that notice should be issued to the petitioners/defendants, there is no entry in the roznama that such a notice was issued and served upon the petitioners. Except for one entry on 5th January, 2001, I find that on any of the subsequent dates the presence of the advocate for the petitioners or the petitioners is not noted. On the contrary, both of them are shown as absent. It appears that though notice which was ordered to be issued was not served on the petitioners/defendants, the court proceeded with the further hearing of the suit and the decree was passed. As pointed out in the earlier part of the judgment though the roznama dated 5th January, 2001 records that the defendant's advocate was present, in the next sentence it is recorded that the defendant and his advocate were absent. Thus, there is a substance in the contention raised

of petitioners that the trial court proceeded to decide the suit without notice being served on the petitioners.

7. It is true that the petitioners have admitted that they engaged the services of another advocate after their earlier advocate retired from practice and left for his native place. But the said admission is of no significance as the trial court itself on 23rd November, 2000 directed that notice should be issued to the defendant/petitioners. Therefore, no signifance can be attached to the fact that the application was made for the certified copy by the said advocate which was engaged by the petitioners. In my view, the learned Appellant court was right when he accepted the case of the petitioners that they had no knowledge about the decree till 3rd January, 2003 when notice of execution was served.

8. So far as the subsequent delay is concerned, it is true that there is no explanation why the petitioners' waited for 20 days to apply for the certified copy of the Judgment and Decree and there is no clear explanation as to why the appeal was filed on 3rd March, 2003 when certified copies were received on 21st February, 2003. It must be noted here that the approach of the court while dealing with application for condonation of delay ought to be liberal and justice oriented. Question of condoning the delay arises only when there is some lapse ont the part of a litigant. If there is some explanation for the delay and if the delay is not attributable to any negligence on the part of the litigant, normally delay has to be condoned. In my view, the learned Additional District Judge ought to have taken a liberal view of the matter especially in the light of the fact that the trial court proceeded to decide the matter without notice being served on the petitioners. It is true that by condoning the delay some prejudice is also caused to the rival party but such a party can always be compensated by ordering payment of costs.

9. In the facts of the present case, costs will have to be quantified at Rs.10,000/- which will be payable condition precedent.

10. Hence, I pass the following order :

(i) The impugned judgment and order dated 4th August, 2004 is quashed and set aside. Civil Misc.Application No. 76 of 2003 is allowed and delay in preferring the appeal against the judgment and decree dated 22nd March, 2002 in Special Civil Suit No. 25 of 1978 passed by the learned 4th Joint Civil Judge, (S.D.) Thane is condoned.

(ii) Petitioners are directed to pay costs of Rs.10,000/- to the respondent within a period of three weeks from today.

(iii) If the respondents does not accept the amount of costs, the petitioners will deposit the same in the District Court within the stipulated period. It is made clear that payment of costs will be condition precedent and if the petitioners failed to pay the costs within the stipulated time, the impugned and order will stand.

Rule is made absolute in the above terms.

Parties to act on an authenticated copy of the order.

A.S.OKA, J